

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 05/18/2017

TIME: 10:19:00 AM

DEPT: C-73

JUDICIAL OFFICER PRESIDING: Joel R. Wohlfeil

CLERK: Juanita Cerda

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT:

CASE NO: 37-2016-00032816-CU-TT-CTL CASE INIT.DATE: 04/08/2016

CASE TITLE: **Socal Environmental Justice Alliance vs. San Bernardino Valley Municipal Water District [E-FILE]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Toxic Tort/Environmental

APPEARANCES

The Court, having taken the above-entitled matter under submission on May 16, 2017 and having fully considered the arguments of all parties, both written and oral, as well as the administrative record, now confirms the tentative ruling (ROA # 62). This ruling constitutes the final disposition of this action. Respondent SAN BERNARDINO VALLEY MUNICIPAL WATER DISTRICT and Real Party In Interest EAST VALLEY WATER DISTRICT are entitled to a judgment denying the writ of mandate.

Tentative as confirmed:

The Application (ROA # 53) of Respondents San Bernardino Valley Municipal Water District and San Bernardino Valley Municipal Water District Board of Directors (collectively "Valley District") and Real Party in Interest East Valley Municipal Water District ("East Valley") for an order shortening the notice and time for hearing, pursuant to CCP Section 1005 and California Rules of Court, Rule 3.1300 (b), on their Motion to Augment the Administrative Record (attached to this Ex Parte as Attachment 1), is DENIED.

The Court is not persuaded that Valley District and East Valley have shown good cause to warrant an order shortening time, even if the Court were capable of setting a shortened hearing prior to the writ hearing on May 16, 2017. Further, the Court is not persuaded that Valley District and East Valley have shown undue prejudice and irreparable harm if not allowed to augment the record. Finally, the Court notes the argument of Petitioner CITY OF SAN BERNARDINO of prejudice to Petitioner, if the Court shortened time to hear Valley District and East Valley's Motion, and the writ hearing were further delayed. ROA # 58, page 7.

The "Verified Petition for Writ of Mandate Pursuant to the California Environmental Quality Act and the State Planning and Zoning Law" filed by Petitioner SOCAL ENVIRONMENTAL JUSTICE ALLIANCE (ROA # 1) was dismissed on November 9, 2016 (ROA # 21), and is not addressed in this ruling.

The Petition (ROA # 7) of Petitioner CITY OF SAN BERNARDINO ("Petitioner" or "CSB") for WRIT OF MANDATE (Code Civ. Proc. 1085, 1094.5, Pub. Res. Code 21167, 21168, 21168.5) against Respondents SAN BERNARDINO VALLEY MUNICIPAL WATER DISTRICT, SAN BERNARDINO VALLEY MUNICIPAL WATER DISTRICT BOARD OF DIRECTORS ("Respondents") and EAST VALLEY WATER DISTRICT ("Real Party in Interest" or "EVWD") to vacate and set aside the certification and approvals of the Sterling Natural Resource Center Project ("Project"), is DENIED.

The Request (ROA # 33) of Petitioner CITY OF SAN BERNARDINO for judicial notice, is GRANTED IN PART AND DENIED IN PART. The Court takes judicial notice of Exhibit's "A and C," and declines to take judicial notice of Exh. "B."

A. Introduction

This writ Petition involves a challenge to the March 15, 2016 decision by San Bernardino Valley Municipal Water District ("S.B. Valley") to approve the Sterling Natural Resource Center ("SNRC" or "Project") and certify the environmental impact report ("EIR") for the Project. The SNRC is a major public works project intended to treat wastewater effluent for the purpose of using the treated wastewater to recharge local groundwater basins (and, to a lesser extent, for habitat restoration). The Project includes a treatment plant, conveyance pipelines and associated pumping and lift stations, and other related collection and discharge facilities. Petitioner's detailed writ Petition asserts several arguments challenging approval of the SNRC. After considering each of these arguments, this Court has determined that the writ Petition must be denied.

B. Applicable Standard of Review

"Any action or proceeding to attack, review, set aside, void or annul a determination... of a public agency, made as a result of a proceeding in which by law a hearing is required to be given..., on the grounds of noncompliance with the provisions of this division shall be in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure." Pub. Resources Code 21168. In reviewing an agency's compliance with CEQA in the course of its legislative or quasi-legislative actions, the Court's inquiry "shall extend only to whether there was a prejudicial abuse of discretion." *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, 426 (quoting Pub. Resources Code 21168.5). Such an abuse is established if the agency has not proceeded in a manner required by law, or if the determination or decision is not supported by substantial evidence. *Id.* Abuse of discretion is established if the County did not proceed as required by law, if its determination was not supported by its findings, or its findings were not supported by substantial evidence. *Citizens To Preserve the Ojai v. County of Ventura* (1985) 176 Cal. App. 3d 421, 428.

"Substantial evidence" refers to enough relevant information and reasonable inferences from this information such that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. 14 C.C.R. 15384(a) ("CEQA Guidelines"). Whether a fair argument can be made that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency. *Id.*

Where an EIR is challenged as being legally inadequate, the Court presumes a public agency's decision to certify the EIR is correct, thereby imposing on a party challenging it the burden of establishing

otherwise. *Sierra Club v. City of Orange* (2008) 163 Cal. App. 4th 523, 530. Petitioner is the moving party and therefore frames the issues to be litigated when the CEQA writ is filed. See *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal. App. 4th 866, 897. Petitioner challenging an EIR for insufficient evidence must lay out the evidence and show why it is lacking. *Defend the Bay v. City of Irvine* (2004) 119 Cal. App. 4th 1261, 1266. Failure to do so is fatal and a reviewing Court will not independently review the record to make up for the failure to carry this burden. *Id.*

The Court does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document. *Citizens To Preserve the Ojai v. County of Ventura*, *supra*. Certification of an EIR which is legally deficient because it fails to adequately address an issue constitutes a prejudicial abuse of discretion regardless of whether compliance would have resulted in a different outcome. *Id.* An omission in an EIR's significant impacts analysis is deemed prejudicial if it deprived the public and decision makers of substantial relevant information about the project's likely adverse impacts. *Neighbors for Smart Rail v. Exposition Metro Line Const. Authority* (2013) 57 Cal. 4th 439, 463. Although an agency's failure to disclose information called for by CEQA may be prejudicial regardless of whether a different outcome would have resulted if the public agency had complied with the law, under CEQA there is no presumption that error is prejudicial. *Id.* Insubstantial or merely technical omissions are not grounds for relief. *Id.* A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decision making and informed public participation, thereby thwarting the statutory goals of the EIR process. *Id.*

Petitioner's writ Petition frames several issues on which it seeks a determination by this Court that the EIR is prejudicially flawed. These issues fall under four main themes: (1) failure to fully analyze and evaluate impacts; (2) inadequate mitigation measures; (3) inadequate analysis of alternatives to the project; and (4) failure to adequately respond to comments. The Court addresses each of these issues in the following sections.

C. Evaluation and Analysis of Potential Impacts

An environmental impact report for a project must include a "detailed statement" setting forth "all significant effects on the environment of the proposed project." Pub. Resources Code 21100(b). "Significant effect on the environment" means a substantial, or potentially substantial, adverse change in the environment." Pub. Resources Code 21068. Section 15064 of the CEQA Guidelines provides a framework for determining whether a project may have a significant effect on the environment. Section 15126 of the CEQA Guidelines provides a framework for evaluating impacts on the environment. Section 15126.2 further details the required impact analysis.

In an effort to provide more meaningful public disclosure, reduce the time and cost and focus on potentially significant effects on the environment, lead agencies are required to "focus the discussion in the environmental impact report on those potential effects... which the lead agency has determined are or may be significant. Lead agencies may limit discussion on other effects to a brief explanation as to why those effects are not potentially significant." Pub. Resources Code 21002.1(e). The EIR need not address an effect in detail once the agency has determined it will not be significant. *Protect The Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal. App. 4th 1099, 1109. Instead, the EIR need only contain a statement briefly indicating the reasons for determining that the effect on the environment is not significant, and consequently has not been discussed in detail. *Id.*

Impacts to Groundwater Quality from Discharge of Recycled Water

Paragraph 46 within the Petition filed by the City of San Bernardino alleges: "The EIR fails to adequately evaluate the impacts of the Project on groundwater quality due to the discharge of recycled water from the SNRC. Specifically, the EIR concludes that the [total dissolved solids or 'TDS'] concentrations in the effluent would be similar to existing groundwater concentrations and thus Project discharges would not increase TDS concentrations in the underlying groundwater within the Bunker Hill Basin.... There is no substantial evidence in the EIR that supports this conclusion, and it is contradicted by substantial evidence...." Paragraph 47 alleges that S.B. Valley, as the lead agency preparing the EIR, "improperly deferred the analysis of impacts that the discharge of high-TDS effluent will have on groundwater quality...."

In *Californians for Alternatives to Toxics v. Department of Food and Agriculture* (2005) 136 Cal. App. 4th 1, the discussion within the EIR regarding the potential environmental impacts of pesticide use reasoned that the pesticide registration regulatory scheme of a different agency ensured that proposed pesticide use would not result in any significant adverse environmental impacts. *Id.* at 15. The Court concluded that the lead agency abused its discretion by relying on this regulatory scheme as a substitute for performing its own evaluation of the environmental impacts of pesticide use. *Id.* at 16. The CEQA analysis of the effects of pesticide use necessarily takes into account this distinct regulatory scheme. *Id.* However, sole reliance on the registration of pesticides and the concurrent regulatory program is inadequate to address environmental concerns under CEQA. *Id.* The lead agency is responsible for analyzing the environmental impacts of proposed pesticide use, notwithstanding the separate regulatory scheme for the registration of pesticides. *Id.* "DPR's registration does not and cannot account for specific uses of pesticides in the PDCP, such as the specific chemicals used, their amounts and frequency of use, specific sensitive areas targeted for application, and the like." *Id.* A lead agency must conduct independent research on the potential impact, although it can appropriately fulfill this duty of independent investigation by considering the regulatory agency's data in the specific context of the subject project. *Id.*

Deferral of the specifics of mitigation is permissible where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan. *Defend the Bay v. City of Irvine* (2004) 119 Cal. App. 4th 1261, 1275. On the other hand, an agency goes too far when it simply requires a project applicant to obtain a biological report and then comply with any recommendations that may be made in the report. *Id.* For kinds of impacts for which mitigation is feasible, but where practical considerations prohibit devising such measures early in the planning process, the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval. *Sacramento Old City Assn. v. City Council* (1991) 229 Cal. App. 3d 1011, 1028, 1029. Where future action to carry a project forward is contingent on devising means to satisfy such criteria, the agency should be able to rely on its commitment as evidence that significant impacts will in fact be mitigated. *Id.* at 1029. It is improper to defer the formulation of mitigation measures until after project approval. *California Native Plant Soc. v. City of Rancho Cordova* (2009) 172 Cal. App. 4th 603, 621. Instead, the determination of whether a project will have significant environmental impacts, and the formulation of measures to mitigate those impacts, must occur before the project is approved. *Id.* On the other hand, when a public agency has evaluated the potentially significant impacts of a project and has identified measures that will mitigate those impacts, the agency does not have to commit to any particular mitigation measure in the EIR, as long as it commits to mitigating the significant impacts of the project. *Id.* "...[T]he details of exactly how mitigation will be achieved under the identified measures can be deferred pending completion of a future study." *Id.*

Table 3.9-4 within the Draft EIR (AR000526) relies on data from the Santa Ana Regional Water Quality

Control Board "Salt and Nutrient Management Plan, 2004." This table lists both actual TDS amounts, and the objective or maximum permissible amount. Importantly, a TDS level that does not exceed the objective set forth in the Management Plan would not be classified as a "significant" impact. See Guidelines at 15064.7(c) ("When adopting thresholds of significance, a lead agency may consider thresholds of significance previously adopted or recommended by other public agencies or recommended by experts, provided the decision of the lead agency to adopt such thresholds is supported by substantial evidence."). The "Bunker Hill A" measurement already exceeds the objective. The "Bunker Hill B" measurement is below the objective such that this area has a 70 mg/l "assimilative capacity." Table 11-1 within the Final EIR lists 463 mg/l as the TDS level for the recycled water effluent. There does not appear to be a source for this data, but Petitioner does not challenge the source or accuracy of this data. The TDS level in the effluent exceeds both the existing levels within the subject groundwater basin, and objective or maximum allowable TDS.

As discussed above, this Court does not address the correctness of the EIR's conclusions, but only upon its sufficiency as an informative document. An omission in an EIR's significant impacts analysis is deemed prejudicial if it deprived the public and decision makers of substantial relevant information about the project's likely adverse impacts. Regarding the potential impact to groundwater quality, the EIR must necessarily provide substantial relevant information in three areas: (a) evidence and analysis regarding TDS levels in the proposed effluent discharge; (b) evidence and analysis regarding existing TDS levels in the groundwater within the Bunker Hill Basin; and (c) evidence and analysis of resulting TDS levels after effluent is discharged and mixed with existing groundwater within the Bunker Hill Basin.

The Draft EIR states: "Anticipated TDS concentrations in the effluent would be similar to existing groundwater concentrations and within the identified assimilative capacity of the groundwater quality objective. As a result, the discharge to City Creek, East Twin Creek Spreading Grounds, or the Redlands Basins would not increase TDS concentrations in the underlying groundwater.... ¶ ... The estimated TDS concentrations in the discharge would be similar to ambient groundwater and therefore would not exceed the assimilative capacity of the basin for TDS." (AR000528 (emphasis added)) In essence, the Draft EIR concludes that the TDS concentrations after the effluent is discharged into the groundwater will not exceed the objective standard. However, there is no citation to data supporting this conclusion. The record supporting the Draft EIR does not reference a study demonstrating that post-assimilation TDS levels, given the anticipated discharge rate, would not exceed the objective or maximum permissible amount. The Draft EIR contains substantial evidence supporting issues (a) and (b), listed above. However, the Draft EIR appears to defer issue (c) for future analysis: "Furthermore, as part of the required NPDES discharge permit, Valley District will be required to prepare an antidegradation analysis that describes the proposed project's potential impact to the Bunker Hill Groundwater Basin. The antidegradation analysis will evaluate the project's impact to the assimilative capacity for salts and nutrients as well as for other constituents of concern." (AR000529)

This deficiency was noted during the public comment period. The Final EIR addressed this concern as follows: "A primary objective of the proposed project is to replenish groundwater with recycled water to meet local demands. Table 11-1 shows the assimilative capacity of TDS and Nitrate (as N) in the relevant groundwater subbasins. Bunker Hill A subbasin (which would receive discharges via East Twin Creek Spreading Grounds) has ambient TDS and N levels that exceed Basin Plan standards established by the Santa Ana RWQCB; as such, no assimilative capacity currently exists for a 10 MGD discharge to that subbasin. Bunker Hill B subbasin (which would receive discharges via City Creek and Redlands Basins) has ambient TDS and N levels well below Basin Plan standards; as such, assimilative capacity does currently exist for a 10 MGD discharge to that subbasin. Antidegradation modeling currently underway suggests that proposed project discharges can be assimilated into the two subbasins within

Basin Plan limits if a majority of Project discharges are recharged into Bunker Hill B, along with blending with Valley District's planned surface water recharge project (6,000 AFY) at East Twin Creek Spreading Grounds." (AR003063-3064)

Attached to the record at Vol. 89, Tab 459 is a document titled "Antidegradation Analysis: Sterling Natural Resource Center -- Administrative Draft." (AR030907, et seq.) A March 3, 2016 PowerPoint presentation demonstrates that this analysis was provided to S.B. Valley for its consideration on March 3, 2016. (AR0034301 and AR0034323) This was prior to S.B. Valley's March 15, 2016 meeting to certify the Final EIR and approve the project. This report consists of an analysis of groundwater quality after the addition of the effluent discharge into the subject groundwater subbasins. This report supports the analysis set forth within the response to comments in the Final EIR. This is substantial evidence supporting the conclusion that discharging the effluent for recharge of the subject subbasins in the manner described will result in a less than significant impact to existing water quality, given the objective or maximum TDS level. This draft report is sufficiently identified and referenced within the Final EIR. In other words, the reference to this draft report is "sufficiently clear" such that a reader has a "road map to the information" the Final EIR intends to convey. See *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, 443 (discussing incorporation of prior FEIR for related project). Petitioner's Reply Brief notes that this report was only available for a short time before the Final EIR was released, and after the comment period for the Draft EIR had closed. However, Petitioner fails to cite authority setting forth any applicable deadline such that this argument lacks merit. In addition, it appears from the discussions in both the Draft and Final EIRs that S.B. Valley had access to preliminary findings from the antidegradation analysis before the draft analysis was finalized and released.

As was apparent in the *Californians for Alternatives to Toxics* case, S.B. Valley is responsible for analyzing the environmental impacts of the proposed wastewater discharge, and it cannot do this in the absence of a completed study regarding the likelihood of groundwater basin degradation. Deferral of the specifics of mitigation is permissible. *Defend the Bay v. City of Irvine*, supra. On the other hand, the determination of whether a project will have significant environmental impacts, and the formulation of measures to mitigate those impacts, must occur before the project is approved. *California Native Plant Soc. v. City of Rancho Cordova*, supra. S.B. Valley has satisfied this standard through its reliance on the draft antidegradation analysis. Thus, sufficient substantial evidence exists within the record supporting the conclusion that impacts to groundwater quality from the discharge of recycled water is less than significant.

The Draft and Final EIRs both refer to mitigation measure "HYDRO-2" in which S.B. Valley District is directed to "prepare and implement a groundwater monitoring program that includes installation of an array of groundwater monitoring wells sufficient to characterize the effects of the discharge on local groundwater quality. If monitoring shows that beneficial uses of the groundwater may become adversely affected by the discharge, the monitoring program would require either modifications to treatment, modify the well screened area by sealing the affected portion of the screen in the impacted groundwater bearing zone, or compensation for adversely affected groundwater wells through replacement of the affected well or through providing replacement water." (AR000529 and AR003064) This commitment to monitor future water quality and a future plan to remedy any potential adverse impacts is made in conjunction with the present ability to provide the relevant decision makers with the necessary information from which to reach conclusions regarding the non-significance of project impacts. As this decision is premised on sufficient substantial evidence (discussed above), the possible mitigation measures are also proper and supported by substantial evidence.

Finally, the Court notes that the response to comments within the Final EIR also references "groundwater modeling reports conducted by Valley District for each of the proposed recharge locations... included in Appendix I." (AR003064) This "Geoscience Technical Memoranda" (AR003502, et seq.) was prepared in March, 2016. This report consists of "hydrogeological analysis and modeling of proposed discharge" into the East Twin Creek Spreading Grounds, City Creek and the Redlands Basins. It is an operational analysis of whether wells would be impacted by an inflow of recycled water exceeding 20 percent (the regulatory limit of recycled water contribution). See Executive Summary (AR003503-3506) Unlike the antidegradation analysis discussed above, the existence of this report does not provide the relevant decision makers with the necessary data regarding the significance of project impacts associated with TDS levels. The Geoscience report expressly does not address the "available assimilative capacity... for TDS." (AR003504 and AR003505). In fact, this report refers to "separate Anti-Degradation analysis being conducted for the Regional Board permit approval process." Id.

Impacts to Domestic Water Supplies and Wells

Paragraph 49 within the Petition alleges: "The EIR fails to consider the impacts that the Project may have to domestic drinking water supplies for Riverside in particular. Valley District failed to provide analysis supported by substantial evidence in the record that groundwater quality in domestic supply wells would not be adversely impacted by the Project, again, improperly deferring analysis of impacts to drinking water quality to the RWQCB discharge permitting process."

This potential impact refers to the total allocation of recycled water within the domestic water supplies extracted from wells within the applicable groundwater basins. As discussed above, the applicable regulatory framework limits this allocation to 20 percent of the total. This concern focuses on the total dissolved solids ("TDS") within extracted drinking water from these wells, as well as the total inorganic nitrogen ("TIN") levels. As discussed above, both the Draft EIR and the Final EIR include a discussion regarding potential impacts to groundwater quality. (See AR000526, AR000528-529 and AR003063-3064) This discussion is premised on data presented via three separate reports: "Geoscience Technical Memoranda" (AR003502, et seq.); "Antidegradation Analysis: Sterling Natural Resource Center -- Administrative Draft" (AR030907, et seq.); and "Title 22 engineering Report: Sterling Natural Resource Center -- Administrative Draft" (AR030970, et seq.). The combined discussion and reports are substantial evidence supporting the finding that this impact is not significant. The discussion presents various scenarios or ways in which the subject groundwater subbasins can be recharged using recycled wastewater from the project. Some of these scenarios will result in outcomes that violate applicable regulatory guidelines for contaminants and for the maximum percentage of recycled wastewater. On the other hand, these studies also present the decision makers with scenarios that adhere to regulatory guidelines, and thus do not result in a significant impact. This is substantial evidence supporting the conclusion that discharging the effluent for recharge of the subject subbasins in the manner described will result in a less than significant impact to domestic water supplies and wells. Finally, the Draft and Final EIRs both refer to mitigation measure HYDRO-2" in which S.B. Valley District is directed to prepare and implement a groundwater monitoring program. If monitoring shows that groundwater may become adversely affected by the discharge, the monitoring program would require specified modifications and/or replacement water. (AR000529 and AR003064) This commitment to monitor future water quality and a future plan to remedy any potential adverse impacts is made in conjunction with the present ability to provide the relevant decision makers with the necessary information from which to reach conclusions regarding the non-significance of project impacts. As this decision is premised on sufficient substantial evidence (discussed above), the possible mitigation measures are also proper and supported by substantial evidence.

Impacts to Water Quality in Santa Ana River from Discharges of Supplemental Water from Rialto Wells

Paragraph 55 within the Petition alleges: "The EIR fails to evaluate impacts to the water quality in the Santa Ana River that may result from the discharge of supplemental water from several wells along the Rialto Channel. The only water quality aspect addressed in the EIR is temperature, and the discussion of the temperature reduction from the use of this supplemental water is based on nothing except Valley District's 'assumption.' The reasonableness of this assumption was undermined by other substantial evidence in the record. Significantly, the EIR contained no analysis or evidence about the water quality impacts of the discharge of supplemental well water into Rialto Channel, and thus there was no substantial evidence to support a finding that water quality in the Santa Ana River would not be impacted by this discharge."

The Draft EIR lists Biological Resources impact 3.4-1: "Construction and operation of the project could have a substantial adverse effect, either directly or through habitat modifications on plant and wildlife species identified as a candidate, sensitive, or special-status species...." (AR000224) Specifically, the Draft EIR details to potential to disturb Santa Ana River habitat for the Santa Ana sucker (an endangered fish species) as a result of reduced flows into the Santa Ana River (reduction of treated wastewater discharge into river channel). As a mitigation measure, the Draft EIR generally references a Santa Ana River habitat conservation plan as a means to restore habitat for this species. (AR000224-227) In the event this conservation plan is not implemented in time, an "SAS Habitat Monitoring and Management Plan" will be implemented as mitigation. (AR000227-228) This management plan includes the following: "e. SAS-6: Supplemental Water. Valley District will increase habitat availability in Rialto Channel during the summer months by providing cool supplemental water from nearby groundwater source to lower the water temperature in this tributary. Supplemental water will be added to the Rialto Channel when water temperatures reach 85 degrees. Supplemental water could be pumped groundwater or other water source. The discharge into the Rialto Drain will require a discharge permit from the Regional Water Quality Control Board." This mitigation measure is repeated at AR000391. The benefit of this measure is described as follows: "Improves water quality conditions within Rialto Channel to create year-round, suitable tributary habitat for SAS and other water native species." Id. The Draft EIR further explains this "Supplemental Water" mitigation measure as follows: "Another means of mitigating the impact to aquatic habitat would be to introduce supplemental water into the river near or upstream of RIX to compensate for flow interruptions. Under current conditions, the RIX facility periodically eliminates discharge for an hour or more while important maintenance is performed on the treatment facility (ESA, 2015b). This periodic reduction of flow can dewater the SAR for over one mile downstream, resulting in a significant temporary loss of habitat. Supplemental water may be obtained from a combination of sources including local groundwater wells and from the use of the Santa Ana River pipeline connecting the SNRC to the SBWRP. Mitigation Measure B10-3 commits Valley District to establishing supplemental water that may be conveyed to the river channel during these periodic shut downs to prevent the river from drying up." (AR000392)

In response to comments, the Final EIR states as follows: "Mitigation Measure BIO-3 provides the mechanism to introduce groundwater into the Rialto Channel to benefit habitat by reducing water temperatures in the Rialto Channel or providing supplemental flows during RIX shutdowns. The goal of this measure is to increase the temporal availability of suitable habitat by reducing water temperatures in the summer to a level below the tolerance threshold of the species. Based on analysis conducted by the USGS, it appears possible to reduce the water temperature from the current 89 degrees Fahrenheit to below 85 degrees Fahrenheit (the maximum tolerance of SAS) with approximately 2 cfs of groundwater,

for a total of about 365 acre feet per year if introduced from July to September. The use of this measure would be on an appropriate scale related to the level of project impact and refined in coordination with the wildlife agencies through the permitting processes and development of the HNINIP. Success criteria and a monitoring plan for this mitigation measure will be included in the HNINIP. The DEIR concludes that, as one component of a broad mitigation strategy, providing supplemental water during the summer months in coordination with the wildlife agencies provides benefits compared to existing conditions and is commensurate with the scale of project level effects. The habitat condition triggers and success criteria will be developed in coordination with the Wildlife Agencies and USGS for inclusion in the HNINIP." (AR003057-3058)

Further, the Final EIR states: "DEIR Figure 2-7g identifies four existing wells in Rialto that could be used to introduce groundwater into the Rialto Channel. The refurbishment of the wells would require minor work to be conducted by Valley District. Table 2-9 of the DEIR recognizes that the use of the wells would require approval of the well owners. Regarding the assumptions on temperature, the DEIR makes a reasonable assumption that the groundwater temperature would be substantially less than the recorded summer-time temperatures in the Rialto Channel which exceed 86 degrees Fahrenheit. The DEIR does not target an ideal water temperature, but rather concludes that use of the wells to lower river water temperatures would improve conditions compared to existing conditions...." (AR003066)

Petitioner argues that the EIR fails to adequately describe or support this mitigation measure, including a failure to specifically address water temperature, volume and quality. Whether the Santa Ana sucker will actually use and benefit from this habitat restoration is unknown. Petitioner's arguments lack merit. The potential benefit of this mitigation measure is premised on sufficient substantial evidence. After a public agency has evaluated the potentially significant impacts of a project and has identified measures that will mitigate those impacts, the agency does not have to commit to any particular mitigation measure, as long as it commits to mitigating the significant impacts of the project. *California Native Plant Soc. v. City of Rancho Cordova*, supra. The details of exactly how mitigation will be achieved under the identified measures can be deferred pending completion of a future study. In this case, water quality testing will occur on any potential well that would be used to supply supplemental water to the Rialto Channel, as required by the NPDES discharge permit. (AR003027) Further, a comment letter submitted by the United States Department of the Interior, Fish and Wildlife Service acknowledges that the proposed supplemental well water would reduce the water temperature in the river channel, and would benefit the Santa Ana sucker population. (AR002893-2894) This federal agency is in "full support of this strategy," and in fact requests that it be expanded. *Id.* This impact is significant and unavoidable. As a result, the EIR appears to offer several good faith alternative means to lessen this impact. This "package" of mitigation measures are based on sufficient data and reasonable assumptions.

Impacts to Water Quality in City Creek

Paragraph 57 within the Petition alleges: "The Project proposes to discharge treated wastewater to City Creek, which has an intermittent municipal drinking water designation.... [D]ischarge of Project water would adversely affect the ability to maintain the drinking water use of City Creek. The EIR fails to analyze the impacts to water quality in City Creek..., stating that any impacts will be dealt with in discharge permitting with the RWQCB, including possibly changing City Creek's designation. Deferring analysis of this potentially significant... violated CEQA." Paragraph 58 alleges: "Additionally, the EIR's conclusion that perennial flow in City Creek will have only minor potential for sediment transport is not supported by substantial evidence. The EIR assumed this to be true based on only speculation."

The subject project proposes to convey treated water to the Santa Ana River, or to one of three

discharge options: City Creek, the East Twin Creek Spreading Grounds, or the Redlands Basins. (AR000218) Table 3.9-2 within the Draft EIR (AR000520-521) summarizes the Regional Water Quality Control Board Santa Ana Basin Plan. This Table notes the "Valley Reach" segment of City Creek has been designated as having an "intermittent beneficial use" as a municipal ("MUN") water supply. The Draft EIR also states: "The MUN designation in the Basin Plan disallows discharge of treated wastewater unless approved by the DDW [State Water Resources Control Board, Division of Drinking Water].... As a result, the Intermittent MUN designation either would need to be amended to allow for the proposed discharge or DDW would need to allow the discharge through their authority provided in the Basin Plan. To obtain DDW approval, DDW would likely require technical studies to evaluate the source water and proposed treatment technologies. Since the segment of City Creek is normally dry as reflected in the Intermittent designation, introduction of a perennial water source would not adversely affect existing surface water municipal uses. With DDW approval, impacts to municipal uses would be considered less than significant." (AR000527)

In response to public comment on this issue, the Final EIR states: "The DEIR evaluates impacts to surface water quality on page 3.9-2 1. The DEIR concludes that since the creek is normally dry, existing surface water quality would not be reduced. However, the DEIR recognizes that the Basin Plan-identified Beneficial Uses of the creek segment include Municipal Use. As a result, the DEIR concludes that a discharge permit from the RWQCB will need to take into consideration potential impacts to drinking water prior to discharge. The DEIR points out that from a permitting standpoint, this could occur with a beneficial use designation change or an approval from the California Division of Drinking Water. Nonetheless, from a water quality impact standpoint, the DEIR concludes that the recharge of recycled water into the ground is consistent with State-wide recycled water policies and local water supply development priorities in a manner that is fully protective of public health." (AR003120-3121)

An August 27, 2015 PowerPoint presentation notes that the purpose of the City Creek discharge is habitat restoration for the Santa Ana sucker, as per the Upper Santa Ana River Habitat Conservation Plan. A discharge would occur to "maintain fish pools in City Creek," and any groundwater recharge is incidental. (AR032935 and AR032955) A March 3, 2016 PowerPoint presentation notes that obtaining an NPDES Permit for the City Creek discharge is a "team priority." (AR034331) The administrative record reflects that there has been much ongoing discussion as to whether the "MUN" designation will be modified such that the City Creek discharge can take place. However, there is also evidence within the record demonstrating that the Bunker Hill subbasins can accommodate all of the recycled water if needed, under various scenarios (as discussed above). Thus, there is no potential for a significant impact. If the "MUN" designation is removed, amended or modified a discharge of treated wastewater into City Creek for habitat restoration would not impact a potential municipal water supply. On the other hand, if the "MUN" designation is not removed or modified, no discharge into City Creek will take place. Therefore, substantial evidence supports the finding of non-significance.

Noise Impacts from Construction and Operation of the Project

Paragraph 64 within the Petition filed by the City of San Bernardino alleges: "The EIR fails to provide any substantial evidence about the current background noise levels in the Project area.... Without information on such noise levels, it was impossible for the public or decision makers to determine whether the additional noise from the Project's construction and operation would be significant. The ER also fails to demonstrate that the proposed mitigation measures would operate to reduce the noise impacts to less than significant, especially given the lack of information about the baseline noise levels at the Project site...."

The Draft EIR at AR000549-570 addresses the potential impacts associated with noise and vibration from construction and operation of the wastewater treatment facility. This includes a sufficient discussion regarding existing noise conditions. See AR000554-555 and AR000563-564. Thus, substantial evidence of existing noise levels is included within the administrative record. This impact analysis, and the proposed mitigations measures are sufficient.

Impacts to Schoolchildren from Use and Storage of Hazardous Materials

Paragraph 66 within the Petition filed by the City of San Bernardino alleges: "The EIR fails to evaluate the risks to schoolchildren from the Project's use of hazardous materials in close proximity to schools and daycare facilities." Paragraph 67 alleges: "The EIR states that hazardous materials will be used and stored at the Project site, which is across the street from a high school and in close proximity to two daycare centers.... The EIR fails to identify the nature of these 'hazardous materials,' and asserts that any impacts would be less than significant because the materials will be handled in accordance with regulations. This is insufficient analysis under CEQA. The EIR did not fully disclose the potential risks to which the Project will expose schoolchildren, and did not consider those risks as compared to current level of hazardous material exposure risk facing schoolchildren or explain how existing regulations would mitigate those risks to a less than significant level."

Petitioner's opening brief fails to address this alleged impact. Thus, this alleged violation of CEQA is not supported by reference to the administrative record. As Petitioner fails to "lay out the evidence... and show why it is lacking" (see *Defend the Bay v. City of Irvine*, supra), the Court rejects this argument. This Court does not independently review the record to make up for the failure to carry this burden. *Id.*

D. Inadequate Mitigation for Groundwater Impacts

Paragraph 52 within the Petition alleges: "52. The EIR fails to provide feasible and effective mitigation for potential groundwater impacts. The EIR, in mitigation measure HYDRO-2, states that if the Project should result in adverse impacts to groundwater quality, Valley District would employ 'treatment modifications' or find a replacement well or provide replacement water. Valley District has not described the 'treatment modifications' it will undertake in the event of an adverse impact to groundwater resources, which is not an adequate commitment to mitigation. Additionally, replacement wells and replacement water are not acceptable mitigation measures under CEQA."

"...[I]t is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects." Pub. Resources Code 21002. "Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so." Pub. Resources Code 21002.1(b). "A lead agency for a project has authority to require feasible changes in any or all activities involved in the project in order to substantially lessen or avoid significant effects on the environment, consistent with applicable constitutional requirements such as the 'nexus' and 'rough proportionality' standards established by case law." 14 C.C.R. 15041(a). The mitigation measure must be "roughly proportional" to the impacts of the project. 14 C.C.R. 15126.4(a)(4)(B); *Dolan v. City of Tigard* (1994) 512 U.S. 374, 392-393 and 394-395; and *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal. App. 4th 342, 364. Mitigation measures requiring adherence to regulatory requirements or other performance criteria are permitted. 14 C.C.R. 15126.4 (a)(1)(B) and *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal. App. 4th 1036, 1060. A condition requiring compliance with regulations is a common and reasonable mitigation measure, and may be proper where it is reasonable

to expect compliance. Oakland Heritage Alliance v. City of Oakland (2011) 195 Cal. App. 4th 884, 906.

Mitigation measure "HYDRO-2" states: "Valley District shall prepare and implement a groundwater monitoring program that includes installation of an array of groundwater monitoring wells sufficient to characterize the effects of the discharge on local groundwater quality. If monitoring shows that beneficial uses of the groundwater may become adversely affected by the discharge, the monitoring program would require either modifications to treatment, modify the well screened area by sealing the affected portion of the screen in the impacted groundwater bearing zone, or compensation for adversely affected groundwater wells through replacement of the affected well or through providing replacement water." (AR000529)

Petitioner cites Gray v. County of Madera (2008) 167 Cal. App. 4th 1099, involving an EIR for a proposed concrete aggregate quarry. The project included "the excavation pit, which could encompass 86 acres of the site upon completion, and the construction and operation of 'an aggregate processing facility, hot mix asphalt plant, administration complex, parking areas, on-site access road, and various other stockpile and processing areas...." Id. at 1105. The project proponent would be permitted to mine 900,000 tons per year of aggregate material for the next 50 years. Id. The area surrounding the project was zoned agriculturally and used primarily for cattle grazing. Id. at 1106. Also, there were "dozens of residences and 55 domestic wells within one mile of the Project. In its May 25, 2006 staff report, the County of Madera Planning Commission stated that '[t]here is concern that over the life time of the mine[,] surrounding property owners might suffer declined well pumping rates caused by the mining operation.'" Id.

The Court found that a mitigation measure "providing replacement water through bottled water is not a viable or effective mitigation measure. It defies common sense for the County to conclude that providing bottled water is an effective mitigation measure. As presented, Mitigation Measure 3.9-1b does not explain how and in what amount the bottled water will be delivered to the neighboring landowners. The measure requires replacement at least equal to the lost amount of water production from the landowners' wells. However, some if not all of the landowners will have fluctuating water usage... Mitigation Measure 3.9-1b does not explain how it will address the issue of fluctuating water usage by supplying bottled water. A water system, as proposed in the Board, could solve this problem. However, the proposal for a water system was never studied by the county staff. Thus, there is no substantial evidence that it is feasible to build a water system. Therefore, Mitigation Measure 3.9-1b does not present viable mitigation options." Id. at 1117-1118. In addition, the mitigation measure improperly deferred formulation of specific mitigation strategies. Id. at 1118. "According to Respondents, there is no improper deferral because the County has committed to a mitigation goal of remedying the decline in water levels of private wells and has listed various mitigation alternatives that can address this problem." Id. Generally, CEQA permits a lead agency to defer specifically detailing mitigation measures as long as the lead agency commits itself to mitigation and to specific performance standards. Id. at 1119. However, the County did "not committed itself to a specific performance standard. Instead, the County has committed itself to a specific mitigation goal - the replacement of water lost by neighboring landowners because of mine operations. However, this goal is not a specific performance standard such as the creation of a water supply mechanism that would place neighboring landowners in a situation substantially similar to their situation prior to the decline in the water levels of their private wells because of the mining operations, including allowing the landowners to use water in a substantially similar fashion to how they were previously using water. Moreover, the listed mitigation alternatives must be able to remedy the environmental problem. We have concluded that the listed mitigation alternatives, except for the building of a new water system, cannot remedy the water problems because they would not place neighboring landowners into a situation substantially similar to what the landowners

experienced prior to the operation of the mine. And the option to build a water system, which is the only effective mitigation measure that was proposed if it was feasible, was never studied or examined. Thus, the County is improperly deferring the study of whether building such a system is feasible until the significant environmental impact occurs." Id.

The Gray case is not analogous. Unlike Gray, there is substantial evidence in the record that corrective measures identified in HYDRO-2 are feasible and effective approaches to remedy water quality problems that may arise in the operation of the wastewater recycling facility. The project at issue in this action generally seeks to improve the surrounding environment by creating a source of water and restoring habitat. This is in marked contrast to the proposed industrialization of the farm land in Gray. Thus, the proposed mitigation is roughly proportionate to the potential impacts of the wastewater recycling project. There is substantial evidence that HYDRO-2 does not make improper deferrals, and does not create additional environmental impacts. There is substantial evidence that the Regional Water Quality Control Board and DDW permitting process will ensure that down gradient wells are not impacted by recycled water. HYDRO-2 provides additional assurances by requiring that S.B. Valley implement a monitoring program. HYDRO-2 also provides performance standards for a number of possible corrective measures that ensure local wells maintain a substantially similar water quality.

"If a mitigation measure would cause one or more significant effects in addition to those that would be caused by the project as proposed, the effects of the mitigation measure shall be discussed but in less detail than the significant effects of the project as proposed." 14 C.C.R. 15126.4(a)(1)(D). An EIR is required to discuss the impacts of mitigation measures. *Save our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal. App. 4th 99, 130. As discussed above, there is substantial evidence within the administrative record demonstrating that the project will not result in significant impacts on the environment; e.g., it will not result in decreased water quality within the existing wells. Thus, the proposed mitigation measures may not be necessary. HYDRO-2 provides additional assurances of long term water quality, but is unlikely to necessitate additional water treatment or the importation of replacement water. Given the remote likelihood of more aggressive mitigation measures, there is no need to discuss the impacts of these mitigation measures in further detail. Thus, it is proper to defer further discussion of potential mitigation measure impacts, especially given the ongoing Regional Water Quality Control Board and DDW permitting process. S.B. Valley's plan to use this permitting process to further inform the final formulation of the mitigation measures is permissible and proper under CEQA.

E. Analysis of Alternatives

Paragraph 70 within the Petition alleges: "The EIR identifies the Project as having a significant and unavoidable impact on the Santa Ana River, and federally threatened Santa Ana sucker fish that live there, from the 6 mgd reduction in flow to the Santa Ana River that would result from the SNRC project. Notwithstanding this finding, the EIR identifies the Project as the environmentally superior alternative, even though EIR Alternative 5, the "Reduced Diversion Alternative," would reduce only half as much flow to the Santa Ana River at the RIX. By reducing only half as much flow - 3 mgd less - Alternative 5 would substantially lessen Project impacts to the Santa Ana River and Santa Ana sucker. Nevertheless, the EIR justifies its selection of the Project as environmentally superior on the theory that the level of mitigation required under the Project as proposed would be greater, and thus better for the environment. This conclusion is wholly unsupported by evidence in the record and by common sense, as there is nothing in the EIR that suggests that the same or similar mitigation could not be conducted for Alternative 5."

Public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects. Pub. Resources Code 21002. The procedures required by CEQA "are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects." Id. There is no ironclad rule governing the nature or scope of the alternatives to be discussed in an EIR, other than the rule of reason. *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 576. Whether to approve a development project is a delicate task which requires a balancing of interests, and is necessarily left to the sound discretion of local officials. Id. "Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." Pub. Resources Code 21061.1. "Feasibility" under CEQA encompasses "desirability" to the extent that desirability is based on a reasonable balancing of the relevant economic, environmental, social, and technological factors. *City of Del Mar v. City of San Diego* (1982) 133 Cal. App. 3d 401, 417. Section 15126.6 of the CEQA Guidelines sets forth the manner in which an EIR must address "a range of reasonable alternatives to the project." In the event specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of such significant effects. *Habitat and Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal. App. 4th 1277, 1302. It is the agency's responsibility to provide an adequate discussion of alternatives, and an EIR should not exclude an alternative from detailed consideration merely because it would impede to some degree the attainment of the project objectives. Id. at 1303. An environmentally superior alternative cannot be deemed infeasible absent evidence the additional costs or lost profits are so severe the project would become impractical. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 736. The EIR must contain facts and analysis, not just the bare conclusions of a public agency. Id.

Currently, treated wastewater is discharged into the Santa Ana River via the "Rapid Infiltration and Extraction" facility ("RIX") operated by Petitioner. This discharge empties into the Rialto Channel, near its confluence with the Santa Ana River. The Draft EIR explains: "The existing discharge from the RIX facility currently provides habitat and is contributing to the long-term viability of the Santa Ana sucker by maintaining suitable habitat for spawning and foraging.... The project would divert 6 MGD of water from the RIX facility, which is approximately 18-21 percent of the 28.5 MGD currently discharged into the Santa Ana River at RIX. The reduction in water that would have been discharged into the Santa Ana River could adversely affect aquatic habitat used by special-status aquatic wildlife species that occur within the river, in particular the Santa Ana sucker." (AR000386). A "reduced discharge study" was conducted "to estimate the changes in depth and velocity that could be expected from a 6 MGD discharge reduction. The study concludes that a diversion of 6 MGD from the Santa Ana River at the RIX discharge would reduce total flow by 18-21 percent, lower water depth in the channel by a maximum of approximately 1.1 inches, reduce the wetted area by 6 percent, and result in an average change in a velocity class of 2 percent (not exceeding 6 percent) of the total channel area. (See Appendix F)... ¶ ...The study found that the SAR is a significantly losing stream below RIX. Flows are reduced by approximately 22 cfs (approximately 42 percent of total flow at the time of the study) at Riverside Avenue which is approximately 6,000 feet downstream of the RIX discharge. The river loses an additional 15 cfs to infiltration within the segment from the Riverside Avenue crossing to approximately 3.5 miles downstream of the RIX discharge. In fact, flow in the river steadily declines with distance from RIX until groundwater begins to feed the river approximately 2.5 miles downstream from the RIX discharge, stabilizing and eventually increasing river flows...." Id. The Draft EIR concludes that the project will have a "significant and unavoidable [impact] for modifications to Santa Ana sucker habitat." (AR000224)

The Draft EIR includes a lengthy discussion regarding maintaining habitat for the Santa Ana sucker

within the section addressing impacts to "Biological Resources." (AR000389-392). Essentially, the Draft EIR refers to the preparation of a Habitat Conservation Plan for the upper Santa Ana River "that will provide for the creation, restoration, and long-term management of suitable habitat within the... watershed, while allowing for a number of covered projects to proceed. The reduction of up to 6 MGD from the RIX discharge could be included as a covered project in the HCP." The Santa Ana River HCP would include a habitat monitoring plan, as well as identify and implement a series of actions to restore habitat for the Santa Ana sucker. "Participating entities would contribute financially to the implementation of the mitigation projects and management actions." The Draft EIR details several habitat remediation measures, including the City Creek discharge discussed above.

Project alternatives are discussed within the Draft EIR at AR000649, et seq. Table 6-2 (AR000650) notes that Alternative 5, the "reduced diversion" alternative, will lessen the impact to "Biological Resources." This alternative would result in the same facilities construction. The project would have the same 10 MGD capacity, but would produce 3 MGD less recycled water for groundwater replenishment. (AR000664) This alternative would return 3 MGD of treated wastewater to the present RIX discharge site. "Alternative 5 would reduce the impact to aquatic habitat by diverting only 3 MGD flow compared with 6 MGD of flow. However, the reduction of 3 MGD flow could still be considered an incremental effect that would increase the stress on a federally threatened species, albeit to a lesser degree than the proposed project. Nonetheless, the potential impact to aquatic habitat would remain significant and unavoidable." Id. The Draft EIR concludes that Alternative 5 would partially defeat the objective of producing recycled water for local groundwater recharge. It is also not the "environmentally superior alternative" because, although more habitat would be preserved in the immediate vicinity of the RIX discharge, this would result in a less "robust" overall habitat conservation plan:

"...Alternative 5 would not avoid any of the significant and unavoidable impacts of the proposed project since it would still result in an incremental effect to an already stressed Santa Ana River aquatic habitat. The potential significant impact to Santa Ana sucker through habitat modifications would occur to a lesser degree since only 3 MGD of flow would be diverted. Therefore, Alternative 5 would result in similar impacts but to a lesser degree. Similarly, Alternative 5 would meet the water supply and groundwater replenishment objectives of the project but to a lesser degree. As a result Alternative 5 would not produce as many benefits related to the treatment and reuse of locally produced wastewater to meet local needs. Since Alternative 5 would reduce flow in the Santa Ana River less than the proposed project, the proposed impact compensation measures would be reduced as well. The habitat management measures identified in Mitigation Measure BIO-3 that would enhance SAR aquatic habitat compared to existing conditions would be less robust with less committed funding from a reliable source. The DEIR Chapter 3.4 concludes that with implementation of Mitigation Measure BIO-3, Santa Ana sucker habitat would be managed and monitored for the benefit of the species, endeavoring to improve habitat conditions compared to existing conditions, even though flows would be reduced. Measure SASI would establish new habitat features below the RIX discharge that is managed and funded. Measure SAS-2 would establish reliable funding for predator control program. Measure SAS-3 would establish reliable funding for invasive plant removal. Measure SAS-4 would establish means of reversing siltation. Measure SAS-5 would provide supplemental water when necessary during RIX shut-downs. Measure SAS-6 would establish funds for Santa Ana sucker populations in the upper watershed. Since Alternative 5 would not contribute as substantially or reliably to this mitigation and management of the habitat or the resolution of regional water supply challenges and wastewater treatment needs, it would not be environmentally superior. Rather, with implementation of Mitigation Measure BIO-3, the proposed project would result in the fewest impacts and the greatest benefits of any of the Alternatives that meet the project objectives. As a result, the proposed project would be considered the Environmentally Superior Alternative."

(AR000666-667)

The "Findings of Fact and Statement of Overriding Considerations" explains that Alternative 5 will also result in a significant impact. (AR000047) Given the highly stressed nature of the subject ecosystem, any reduction in flow will result in significant and unavoidable impacts. Id.

Petitioner contends that this discussion within the Draft EIR assumes, without evidence, that mitigation measures would be scaled back if the reduced diversion alternative is adopted. Essentially, Petitioner contends there is an absence of evidence within the record demonstrating that adoption of the reduced flow alternative in conjunction with all of the habitat mitigation measures is not feasible. S.B. Valley addressed this contention via its response to "late" comments made in response to the Final EIR:

"...The Reduced Discharge Alternative would not eliminate a significant impact of the project. The FEIR reasonably assumes that impacts from the Reduced Discharge Alternative would require commensurately less mitigation acreage. This would include less microhabitat improvements, less exotic weed removal and fewer acres receiving ongoing predator control. In addition, consistent with the updated Mitigation Measure BIO-1 RAFSS [Riverside alluvian fan sage scrub] habitat would be mitigated at a ratio of 3:1. The Reduced Discharge Alternative would provide less RAFSS mitigation than the proposed project. The USFWS has indicated in its comment letter that the full suite of mitigation measures proposed by Valley District are of great importance to the SAS because they address the many stressors for that species and other native fish.... ¶ ...The Reduced Discharge Alternative would result in half the hydrology effects downstream of the RIX discharge requiring half the biological mitigation. The FEIR concludes that the proposed mitigation, specifically BIO-3, would provide benefits to the existing condition. The Reduced Discharge Alternative would result in half the benefits compared to the proposed project."

(AR004142)

This response sufficiently explains why the reduced discharge alternative would also result in less mitigation measures. Further, substantial evidence exists within the record demonstrating that the reduced discharge alternative would partially defeat the project objectives of recycling and reusing wastewater in an effort to resolve regional water supply challenges in a cost effective and environmentally responsible manner. (AR000255) At the same time, the reduced discharge alternative would not alleviate the impacts to the Santa Ana sucker fish habitat. "Feasibility" entails the balancing of various relevant economic, environmental, social and technological factors. Substantial evidence exists within the record from which the relevant decision makers could balance these factors. The record demonstrates an adequate discussion of various reasonable alternatives.

F. Response to Comments on Draft EIR

Paragraph 73 within the Petition alleges: "Valley District failed entirely to address the comments on the Draft EIR by the City's biological expert, GEI, which were attached to the City's comments. These comments raised issues with the Draft EIR's failure to include data on the quality of water in the Rialto Channel wells, and stated that the cooling effect of this water would be negligible, if any, contrary to the Draft EIR's claims. Because these comments were at odds with Valley District's position on the Rialto Channel wells, Valley District was required to provide a written response addressing the issues raised by GEI. By omitting any response to GEI's comments, Valley District failed to proceed in the manner required by law, in violation of CEQA." Paragraph 74 alleges: "Additionally, Valley District failed to

respond adequately to other comments, suggestions, and recommendations on the Draft EIR made by the City and other commenters with regard to the Project's impacts, mitigation measures, alternatives, and other matters. Those responses to comments contain conclusory statements that are unsupported by substantial evidence in the record and others do not fully respond to the comments as submitted."

"The lead agency shall evaluate comments on environmental issues received from persons who reviewed the draft EIR and shall prepare a written response. The lead agency shall respond to comments received during the noticed comment period and any extensions and may respond to late comments." 14 C.C.R. 15088(a). There must be good faith, reasoned analysis in response, and conclusory statements unsupported by factual information will not suffice. *Id.* at (c). When a comment raises a significant environmental issue, there must be some genuine confrontation with the issue; it cannot be swept under the rug. *City of Irvine v. County of Orange* (2015) 238 Cal. App. 4th 526, 553. Responses that leave big gaps in the analysis of environmental impacts are obviously inadequate. *Id.* Also, comments that bring some new issue to the table need genuine confrontation. *Id.* Comments that are only objections to the merits of the project itself may be addressed with cursory responses. *Id.*

GEI Memorandum

An action or proceeding cannot be maintained unless the alleged grounds for noncompliance were presented to the public agency orally or in writing during the public comment period. Pub. Resources Code 21177. S.B. Valley District made the Final EIR available to the public on March 4, 2016. It thereafter held a public workshop, and received public comment prior to certification of the Final EIR. During this time, members of the public, including the City, were permitted to provide additional public comment. However, the City failed to raise this issue of non-compliance. S.B. Valley was never informed of the failure to address the comments set forth in the GEI memorandum. S.B. Valley was never permitted an opportunity to rectify this apparent error. As a result, it would be manifestly unfair to reject the entire CEQA process based on the failure to address the GEI comments. This deficiency is compounded because the GEI comments were not contained in correspondence addressed to S.B. Valley. Instead, the comments are contained within a memorandum addressed to the City of San Bernardino. (AR002935) In any event, any omission on the part of S.B. Valley is not prejudicial because the issues raised in the GEI memorandum were adequately addressed in response to other comments.

Adequate Response to Other Comments

Petitioner argues that S.B. Valley provided inadequate responses with respect to certain comments made by Petitioner City and Social Environmental Justice Alliance. The Court disagrees and finds that, on balance and when viewed in context, the comments were sufficient and made in good faith. S.B. Valley was not required to provide additional evidentiary support for its conclusions because the evidence cited was already sufficient. In addition, to the extent incomplete responses to some comments were provided, this was not prejudicial given that complete responses to other related and overlapping comments were provided.

G. Conclusion

Petitioner's writ application is denied. As set forth above, the CEQA process was adequately undertaken such that the lead agency and the public were reasonably able to analyze the costs and benefits of the subject wastewater recycling project. Every project must comply with the procedures set forth within CEQA as a means to foster good governance and public participation in the process of environmental review. See 14 C.C.R. 1503 (and cases cited therein). The detailed analysis employed prior to approval

of this project satisfies this standard.

Joel R. Wohlfeil

Judge Joel R. Wohlfeil